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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.

DANA FLINCHUM,

V.

CLINCHFIELD RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT of APPEALS FOR THE SIXTH CIRCUIT

CITATIONS AND OPINIONS BELOW

The *Per Curiam* opinion of the Court of Appeals, printed in Appendix B, hereto, page 19 , rendered May 26, 1972. The opinion of the District Court (filed August 4, 1971), printed in Appendix B, hereto, *infra*, page 13 .

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1972, (Appendix B, *infra*, page 19). The application of the petitioner for a rehearing was denied by Order of the Court of Appeals, entered on June 20, 1972, Appendix B,

infra, page 28. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1) and Constitution of the United States, Amendment 7.

QUESTIONS PRESENTED

1. Whether the Court of Appeals has the authority to assume the validity of the jury's verdict on question of railroad's negligence, as it did in this case, and reject the jury verdict on the question and effect of plaintiff's negligence on a set of facts on which the history of the case shows that reasonable minds could and did differ.

2. Whether the Court of Appeals violated Amendment 7 of the Constitution of the United States by substituting its judgment of the facts in the case at bar for the jury's finding of facts fixed by its verdict.

3. Whether the Court of Appeals effectively frustrated plaintiff-appellant's constitutionally guaranteed right of trial by jury by a misapplication of the Tennessee Doctrine of Remote Contributory Negligence.

STATEMENT

The case is well stated in the Memorandum Opinion and Order entered by the trial court on August 4, 1971, Appendix, page 13 , as follows:

"Mr. Flinchum testified that on the evening of Friday, December 12, 1969, he was in the act of crossing railroad tracks some 15 or 20 feet from the intersection of such tracks with Buffalo Street in Johnson City, Tennessee, near the defendant's station. He said that a sign erected at or near such crossing blocked his view up the tracks; but that he saw the headlights of a train approaching in his direction, when it was some 25 to 30 feet distant from him. He testified that, when he recognized the approach of a train, he ran across the set of tracks on which he thought the train was approaching; then recognized that the train was approaching him on a second set of tracks; that, when the train was about 10 or 15 feet from him, he undertook to reverse his direction, stumbled, fell, and caught his left foot under a rail while turning; that the locomotive ran over his left leg, which threw his right leg thereunder; that the locomotive then ran over his right leg, and he was flung free of the remainder of the passing wheels of the train.

No other eye-witness to this accident was offered, and the other direct and circumstantial evidence presented was in much conflict. It is undisputed that the first set of tracks Mr. Flinchum claims he crossed belonged to the ET&WNC Railroad Company, that the second such set of tracks were owned by the defendant, and that Mr. Flinchum's legs were run-over by a train of the defendant Clinchfield."

This is a diversity railroad train–pedestrian accident. Suit was originally filed in the Law Court at Johnson City, Tennessee, and removed by the defendant to the United States District Court, Eastern District of Tennessee, Northeastern Division, under the provisions of 28 U. S. C., Section 1332(a)(1)(c), 1441.

Why The Writ Should Be Granted

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Court of Appeals substituted its judgment for the judgment of the jury who were triers of the facts and deprived the plaintiff of the constitutional right granted him by Amendment 7 of the Constitution of the United States. The Court of Appeals refused to honor the jury finding, necessarily inherent in the verdict, that plaintiff's negligence was remote, not proximate. Although the Court said that reasonable minds could not differ, two different jury panels have passed on this matter after hearing **all** the evidence and disagreed with the Court's conclusion as evidenced by two verdicts. Finally, the Court of Appeals could not recognize the validity of the jury verdict as to defendant's negligence and reject it as to the existence and effect of plaintiff's negligence, if there is any evidence to support the verdict. Causation, defendant's negligence, plaintiff's negligence, proximate or remote, were all fact questions properly submitted to the jury and the Court of Appeals is not at liberty to substitute its judgment for that of the jury merely because it disagrees with the jury, unless there is a total failure of proof to support the jury verdict, which the Court of Appeals did not find to be the case here.

The Court of Appeals stated that the principal issue on appeal was whether the District Court erred in refusing a directed verdict for defendant. See Record of District Court in overruling defendant's motion for judgment notwithstanding verdict after second trial, Appendix B, dated August 4, 1971, page 13 .

The Court of Appeals cited ***Wallace vs. Louisville & Nashville R.R. Co.*** 332 Fed. 2d 97 (6th Cir.) 1964 **but failed to apply it to the case at bar.** The facts are nearly analogous except that it involved a truck crossing the track rather than pedestrian.

The Court held:

Combination of railroad train's dangerous rate of speed with the existence of blind and dangerous crossing presented an issue of **fact for jury** as to railroad's negligence in train-truck collision resulting in death of truck driver.

Whether an early emergency application of brakes would have retarded speed of train sufficiently to avoid injury to motorist **was for jury** in suit against railroad for wrongful death and property damage.

The Court of Appeals failed to consider plaintiff's unfamiliarity with this crossing and in this regard the Court stated:

Contributory negligence, if any, of truck driver approaching unfamiliar and partially obstructed railroad grade crossing as which he was killed in train-truck collision and **proximate cause of accident were for the jury.**

In reference to the creation of the obstruction to the railroad crossing Court held:

That railroad had not erected obstruction which had obscured truck driver's view of grade crossing was immaterial on issue of railroad negligence in wrongful death action where it had knowledge of the condition.

The Court concluded that:

. . . although this was a close case, **the issues of proximate and remote contributory negligence were properly submitted to the jury.**

It is respectfully submitted that the Court of Appeals totally disregarded remote contributory negligence as being a jury question in view of all the facts in this case.

Maxwell v. Western Atlantic R.R. Co. also cited by Court of Appeals held that:

Where Federal Courts jurisdiction arising out of railroad crossing accident was based upon diversity, Court must look to law of state where accident occurred in resolving all issues of substantive law, *ie*: that part of the law which creates, defines, and regulates rights.

The *Union R.R. Co. v. Jinks* is distinguishable in that plaintiff had unobstructed view of tracks and during daytime (4:00 P.M.) ran into the side of a train and further there was no evidence of negligence on the part of railroad contrary to the Court of Appeals finding in this case.

In the case at bar the Court of Appeals stated:

"We assume the validity of the jury's verdict on the question of railroad's negligence."

It is respectfully submitted that the Court of Appeals is bound by that holding as a matter of law and must accept the verdict of the jury in its entirety based on the latest case holding, specifically, *Southern Railroad Co. v. Sloan*, 407 S. W. 2d 205. *Certiorari* denied by Supreme Court of Tennessee, June 20, 1966. This recent case in Tennessee held that negligence is a question for the jury.

> . . . questions as to whether railroad was guilty of negligence in the construction of the railroad crossing, whether its engineer was guilty of negligence in failing to keep a proper lookout for automobiles traveling on the public street over the improperly constructed crossing and in failing to take reasonable steps to avoid the collision and in failing to take reasonable steps to avoid the collision after he knew, or should have known, that automobile was in a position of peril, and as to **whether the several acts of negligence, or any one of them, was the proximate cause of the accident and resulting deaths and damage were for the jury.**

Review by an appellate court must be governed by the rule safeguarding the constitutional right of trial by jury which required appellate court to take the strongest legitimate view of all the evidence to uphold the verdict, to assume the truth of all that tends to support it, to discard all to the contrary, and to allow all reasonable inferences to sustain the verdict, and if there is material evidence to support the verdict, it must be affirmed.

Where there is remote contributory negligence which must be **considered by jury in mitigation of damages**, jury's decision as to amount of damages is entitled to great weight and **appellate court will not substitute its judment for that of jury, especially when verdict is approved by trial court.** *McCullough v. Johnson Freight Lines, Inc.* 308 S.W. 2d 387 (6).

It is our final position that the court of Appeals was in error in applying the law of *Dean v. Southern Railway Co.*, 327 Fed. 2d 757 (6th Cir. 1964) in that this was a Virginia case and Virginia substantive law applied which does not include remote contributory negligence as the State of Tennessee requires in the resolution of the instant case. Further, the *Sloan v. Southern Railway Co.*, heretofore cited, supercedes the Dean case and is the controlling law in Tennessee; 407 S.W. 2d 205, *Certiorari* denied by Supreme Court of Tennessee, June 20, 1966.

Tennant v. Peoria & P.U. Ry. Co., 64 S. Ct. Reporter, 321 U. S., 412.

It is respectfully submitted that the Court of Appeals has substituted its judgment for the judgment of the jury in reference to remote contributory negligence. In fact, the Court failed to even mention remote contributory negligence in its discussion and disposition of this case.

Issues that depend on the credibility of witness, and the effect or weight as evidence, are to be decided by the jury. ' ' 'Where uncertainty as to the existence of negligence arises from a conflict in the testimony or becuase, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. ***Richmond & Danville R. Co. v. Powers***, 149 U. S. 43, 45, 13 S. Ct. 748, 37 L. Ed. 642.

It has long been the law in Tennessee that remote contributory negligence must be considered by the jury in mitigation of damages. ***Louisville & Nashville Railroad Company v. Martin***, 113 Tennessee 266, 87 S.W. 418.

The Court further stated:

The wisdom and soundness of this rule must be apparent on a moment's reflection, for, **if as a matter of law**, it is not the duty of the jury, in the assessment of damages to mitigate the recovery in proportion to the contribution of the plaintiff to the injuries, cases would occur where gross injustice would be inflicted upon defendants, in the exercise of the jury's discretion, in ignoring altogether the contributory negligence of the plaintiff. 113 Tenn. at page 278, 87 S.W. at page 421.

In the case at bar if the jury had not mitigated the judgment based on remote contributory negligence of plaintiff the judgment for such horrendous injuries could have easily been in excess of $200,000.00.

The most recent case decided by Court of Appeals of Tennessee, Middle Section, August 28, 1970, *Certiorari* denied by Supreme Court of Tennessee, February 16, 1971, **Stallings v. Taylor, 463 S.W. 2d 416 (3).**

The Court affirmed lower court holding for judgement for plaintiff in the amount of $70,000.00 held:

> Reaction time to observe crises or emergency varies with individual and circumstances and **cannot** be said to be a matter of judicial knowledge.

It is, therefore, respectfully submitted that the Court of Appeals has substituted its judgment on question of fact which is within exclusive province of the jury in the case at bar and consequently denied plaintiff of his constitutional right for jury to pass on facts of case in view of all the Courts' holdings as herein cited in Tennessee.

CONCLUSION

In conclusion it is respectfully submitted that two juries which consisted of a total of 24 people have heard the case on two separate occasions in its entirety and on this action the Court of Appeals has taken away the plaintiff's right to a verdict of a jury in controvention of the plaintiff's constitutional guarantee of the **7th Amendment and substantive law of the United States of America.**

IT IS THEREFORE respectfully submitted that this Petition for Writ of *Certiorari* be granted, or in the alternative the judgment of Court of Appeals reversed and the judgment of the district court reinstated in the amount of $50,000.00 as awarded by the second jury.

APPENDIX A

Statutory and Constitutional Provisions Involved.

The Constitution of the United States, Amendment 7:

> Trial by Jury in Civil Cases--In suits at common law, where the controversy shall exceed ($20) twenty dollars, right of trial by Jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the common law.

Tennessee Code Annotated 65-1208, Accidents, Precautions to Prevent–

> Every railroad company shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead; and when any person, animal or other obstruction appears on the road, the alarm whistle shall be sounded, the brakes put down and every possible means for it to stop the train to prevent an accident.

Tennessee Code Annotated 65-1209, Violation of 65-1208 is Negligence *Per Se* –Burden of Proof–

> Violation of any of the provisions of 65-1208 by any Railroad Company shall constitute negligence, *per se*, and in the trial of any causes involving said 65-1208, the burden of proof, the issue of proximate cause, and the issue of contributory negligence shall be tried and be applied in the same manner and with the same effect as in the trial of other negligence actions under the common law in Tennessee.

APPENDIX B

Exhibit 1

No. 2494

United States District Court

FOR THE

EASTERN DISTRICT OF TENNESSEE, NORTHEASTERN DIVISION

DANA FLINCHUM
Plaintiff

v.

CLINCHFIELD RAILROAD COMPANY,
Defendant

JUDGMENT
(Filed December 9, 1970)
Before C.G. Neese, *United States District Judge*

This action came on for trial before the Court and a jury, Honorable C.G. Neese, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff Dana Flinchum recover of the defendant Clinchfield Railroad Company the sum of seventy-five thousand ($75,000) dollars, with interest thereon as provided by law, and his costs of action.

Dated at Greeneville, Tennessee, this 9th day of December, 1970.

Karl D. Saulpaw, Jr.
Clerk of Court
By Agnes Hawkins
Deputy Clerk

DANA FLINCHUM
Plaintiff

v.

CLINCHFIELD RAILROAD COMPANY,
Defendant

JUDGMENT
(Filed May 21, 1971)

Before C.G. Neese, *United States District Judge*

This action came on for trial before the Court and a jury, Honorable C.G. Neese, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff Dana Flinchum recover of the defendant Clinchfield Railroad Company the sum of fifty thousand ($50,000) dollars, with interest thereon as provided by law, and his costs of action.

Dated at Greeneville, Tennessee, this 21st day of May, 1971.

Karl D. Saulpaw, Jr.
Clerk of Court
By Agnes Hawkins
Deputy Clerk

Exhibit 2 **No. 2494**

In The United States District Court

FOR THE

EASTERN DISTRICT OF TENNESSEE, NORTHEASTERN DIVISION

DANA FLINCHUM,
Plaintiff

v.

CLINCHFIELD RAILROAD COMPANY,
Defendant

MEMORANDUM OPINION AND ORDER
(Filed August 4, 1971)

Before C.G. Neese, *United States District Judge*

This is a diversity railroad train-pedestrian accident, in which the pedestrian Mr. Flinchum was awarded damages of $50,000 by the jury. The defendant has interposed a timely motion for a judgment notwithstanding such verdict, Rule 50 (b), Federal Rules of Civil Procedure, or, in the alternative, for a new trial, Rules 59 (a), (b), Federal Rules of Civil Procedure.

Mr. Flinchum testified that on the evening of Friday, December 12, 1969, he was in the act of crossing railroad tracks some 15 or 20 feet from the intersection of such tracks with Buffalo street in Johnson City, Tennessee, near the defendant's station. He said that a sign erected at or near such crossing blocked his view up the tracks; but that he saw the headlights of a train approaching in his direction, when it was some 25 to 30 feet distant from him. He testified that, when he recognized the approach of a train, he ran across the set of tracks on which he thought the train was approaching; then recognized that the train was approaching him on a second set of tracks; that, when the train was about 10 or 15 feet from him, he undertook to reverse his direction,

stumbled, fell, and caught his left foot under a rail while turning; that the locomotive ran over his left leg, which threw his right leg thereunder; that the locomotive then ran over his right leg, and he was flung free of the remainder of the passing wheels of the train.

No other eye-witness to this accident was offered, and the other direct and circumstantial evidence presented was in much conflict. It is undisputed that the first set of tracks Mr. Flinchum claims he crossed belonged to the ET&WNC Railroad Company, that the second such set of tracks were owned by the defendant, and that Mr. Flinchum's legs were run-over by a train of the defendant Clinchfield.

The Court submitted to the jury the issue of whether Mr. Flinchum was a trespasser upon the premises of the defendant. The Court instructed the jury, *inter alia:*

> A railroad track is not constructed as a walkway for pedestrians. It is in itself an admonition of danger. If Mr. Flinchum went upon the tracks of the defendant Clinchfield Railroad, other than at a public crossing without the invitation of the defendant, then he was a trespasser. The fact that persons are accustomed to walk upon a particular railroad track with the passive acquiesence or permission of a railroad company is not sufficient to constitute an invitation. In order to find that Mr. Flinchum was not a trespasser here, you must find that there is some evidence of an inducement on the part of the defendant for him to use the place he was using as a crossing: in other words, some indication that the particular place or way where Mr. Flinchum was, was designed by the defendant for persons to walk upon.

[See *Nashville, C. & St. L. Ry. v. Lovejoy* (1917), 138 Tenn. 492, 506, 198 S.W. 61, 65 [4,5].]

> However, even if you should find that Mr. Flinchum was a trespasser, the defendant Clinchfield

still had a duty not to cause injury to him. If you should find that Mr. Flinchum was trespassing upon such tracks and was injured while thereon, such fact would not prevent him from recovering for injuries negligently inflicted by the defendant Clinchfield Railroad Company, if the injuries might have been averted by the use of ordinary care on the part of the defendant's employees.

[See *Nashville C. & St. L. Ry. v. Brymer*, C.A. Tenn. (1938), 22 Tenn. App. 468, 124 S.W. (2d) 261, 263 [1], *certiorari* denied (1939).]

The defendant Clinchfield had the duty to keep a reasonable lookout for trespassers upon its tracks, and the duty to exercise such reasonable care, as the circumstances required, to prevent injury. The more populous the neighborhood in which the train was moving, the greater the necessity for vigilance in observing the track. At crossings and points where the track was used as a walkway, the more imperative the duty.

[See *Louisville & N. R. Co. v. Wallace* (1890), 89 Tenn. 370, 15 S.W. 919, 920-921.]

A proper lookout means that the lookout ahead must have had good eyesight and must have occupied a position to enable him to see ahead to the best advantage. In addition, the engine must have been equipped with a good headlight.

[See *Walton v. Chattanooga Rapid-Transit Co.* (1900), 105 Tenn. 415, 424, 58 S.W. 737, 739.]

If Mr. Flinchum was upon the track and near enough to be in apparent danger, he should have been warned of the approach of the train. If the usual warning whistle was not effective to make him move,

then the defendant Clinchfield had the duty to use every possible means to stop its train. If some time at or before Mr. Flinchum's point of injury, the defendant Clinchfield had actual knowledge, or would have had knowledge had it been maintaining a proper lookout, of Mr. Flinchum's danger, and failed to exercise ordinary care to avoid such injury to Mr. Flinchum, then Mr. Flinchum is entitled to damages.

[See *Louisville & N.R. Co. v. Wallace, supra.*, 15 S.W. at 921, *Todd v. Cincinnati, No.O. & T.P. Ry. Co.* (1916), 135 Tenn. 92, 104, 185 S. W. 61, 65 [5], [6,7].]

Of course, if you should find that Mr. Flinchum was in possession of his normal faculties, and knew of and saw the approaching train but still tried to cross the tracks in disregard of his own safety, any failure of the defendant to ring its bell, blow its whistle, or keep a proper lookout ahead would not be a proximate cause of Mr. Flinchum's injuries. Similarly, actionable negligence cannot be predicted upon obstructions to the view alone, no matter by whom erected and maintained.

[See *L. & N. R. R. Co. v. Frakes and Payne,* C.A. Tenn. (1928), 11 Tenn. App. 593, 605, judgment affirmed Tenn. S. Ct. (1930).]

***[W]hile the defendant Clinchfield Railroad Company had the duty to observe proper precautions for the safety of persons, the law also places a duty upon persons who go upon, or cross, railroad tracks. If a person of ordinary intelligence and possessed of normal sight and hearing voluntarily places himself in front of a moving train while such train is approaching him and in full view, and if while in this position he learns of such approaching danger in sufficient time for him to get out of the way and he fails to do so, such person would be guilty of contributory negligence so as to bar any recovery.

In other words, Mr. Flinchum had a duty, before going onto the defendant Clinchfield's tracks, or near enough thereto to be injured by a passing train, to use ordinary care and caution in looking about him to ascertain if there was any danger in going upon said tracks. If Mr. Flinchum knew, or should have known, that a train was approaching and he attempted to cross the tracks without making proper allowance for stumbling or falling, then he assumed the risk of his injury. Thus, if you should find that Mr. Flinchum through the use or ordinary care and caution knew, or should have known, of the approach of the defendant Clinchfield's train, and failed to use ordinary care and caution in attempting to cross said tracks, then Mr. Flinchum would not be entitled to recover damages.

[See *Southern Ry. Co. v. Pugh* (1896), 97 Tenn. 624, 626, 37 S. W. 555, 557.]

Mr. Flinchum was rendered permanently disabled by this accident, by the loss of both of his lower limbs. He had a life expectancy at the second trial of 27.81 years. He testified that he had been averaging about $5,000 a year as a barber before this impairment. He incurred medical expenses of $1,842.67. The issue of the reasonable probability of future medical expenses proximately resulting from this accident was submitted to the jury, along with all other factual issues.

This was the second trial of this action.* The Court is satisfied that the issues were submitted to the jury in the second trial on full and proper instructions as to the law

*The Court found after the first trial, when the plaintiff was awarded damages of $75,000, that its instructions to the jury were obviously erroneous and highly prejudicial to the defendant and awarded the defendant a new trial. See memorandum opinion and order herein of March 23, 1971.

governing this action. "*** When the trial judge submits an issue to a jury for its determination, it is not for him afterward to reweigh the evidence and set aside the jury verdict, merely because the jurors might have drawn different inferences or conclusions from the evidence, or because the trial judge might feel another result would have been more reasonable.***". *United States ex. rel. T.V.A. v. 544 Acres of Land, Etc.,* D.C. Tenn. (1969), 309 F. Supp. 46, 48 [7].

That the jury found the issues difficult of resolution is indicated by the fact that it deliberated an aggregate of eight hours, twenty-two minutes, before reporting a unanimous decision. The Court has considered all the grounds for the two-pronged motion of the defendant and is satisfied that all lack merit. The defendant's motion of June 1, 1971 hereby is

OVERRULED.

ENTER:

C.G. Neese
United States District Judge

No. 71-1821

Exhibit 3

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

DANA FLINCHUM,
Plaintiff-Appellee

v.

CLINCHFIELD RAILROAD COMPANY,
Defendant-Appellant

On Appeal from the United States District Court, Eastern District of Tennessee, Northeastern Division.

Decided and Filed May 26, 1972.

Before: Celebrezze and Peck, *Circuit Judges*, and O'Sullivan, *Senior Circuit Judge*.

Per Curiam. This is an appeal from a personal injury action arising out of a railroad train-pedestrian accident. The jury in the trial court found for plaintiff, Dana Flinchum, and granted recovery in the amount of $50,000.00. The principal issue on appeal is whether the District Court erred in refusing to direct a verdict for the defendant Clinchfield Railroad Company, on the ground that plaintiff was guilty of contributory negligence, which under Tennessee law is a complete bar to recovery in a negligence action.[1]

[1]This appeal is taken from the second trial in this case. Following judgment for plaintiff in the first trial, the District Judge granted defendant's motion for new trial in light of "an erroneous and prejudicial jury instruction." At the second trial, the Court twice overruled defendant's motion for directed verdict and subsequently overruled defendant's motion for judgment n.o.v. and motion for new trial.

The accident occurred at approximately 6:30 p.m. on December 12, 1969, in Johnson City, Tennessee. Flinchum, who was the only witness to the accident, testified that it was cold and dark on the evening in question and that he was walking along Buffalo Street in Johnson City in a southerly direction. He stated that as he came upon a railroad crossing on Buffalo Street, a sign erected near the tracks obstructed his view of the tracks to the East (or to his left), but that he could see the headlight of a train proceeding toward him from the East. The crossing was double tracked and Clinchfield owned the second set of tracks as viewed in the direction Flinchum was walking. (The first right of way was owned by another carrier.) Flinchum testified:

> "I run across the first track and beat [the train] across, but it wasn't on that track. I got up on the [second set of tracks] and looked and realized that was the track it was on. And I turned around and tried to get back off and stumbled and fell."

When he fell, his foot caught under the track and both legs were run over by the oncoming train. Flinchum suffered several severe injuries from the accident and was rendered incapable of returning to his former occupation, which was barbering.

In this diversity action, Tennessee law controls as to resolution of all substantive issues and we are required to consider the evidence in the light most favorable to plaintiff. *Wallace v. Louisville and Nashville R. R. Co.,* 332 F.2d 97 (6th Cir. 1964); *Maxwell v. Western-Atlantic R. R. Co.,* 295 F. Suppl. 740, 743 (E.D. Tenn. 1967), *aff'd,* 406 F.2d 1326 (1969). We assume the validity of the jury's verdict on the question of the railroad's negligence for purposes of this appeal. As previously indicated, our sole consideration is whether the facts herein show proximate Contributory negligence as a matter of law, which in Tennessee is a complete bar both to a common law cause of action based on

negligence and to a negligence action under the provisions of the Tennessee Statutory Precautions Act, *Tenn. Code Ann. Nos. 1208 and 1209. Baggett v. Louisville & Nashville R. R. Co.*, 51 Tenn. App. 175, 365 S.W.2d 902, 904 (1962).

The plaintiff's own testimony, quoted above, establishes a complete disregard for his own safety. He therein conceded that he knew of the presence of the train, yet he tried to "beat it across." He admitted that he started to run across the first set of tracks when the train was only 25 to 30 feet away and proceeding at a speed of 50 to 55 miles per hour. He frankly said he thought the train was on the first set of tracks and didn't discover his error until he stepped onto the second set of tracks when the train was 5 to 10 feet from him. It was at this point that he "stumbled and fell," and was run over.

In Tennessee, it is well established that a railroad crossing is a warning of danger to the traveler and he is required to exercise ordinary carein looking out for his own safety. *Maxwell v. Western-Atlantic R. R. Co., supra,* 295 F. Supp. at 745; *Todd v. Cincinnati N.O. & T.P. Ry. Co.,* 135 Tenn. 92, 185 S.W. 62 (1916); *Union Ry. Co. v. Jinks,* 55 Tenn. App. 491, 402 S.W.2d 495 (1965). While it is doubtful that Flinchum's estimation of the speed and distance of the train at the time he ran onto the crossing was entirely accurate, the only conclusion to be reasonably drawn therefrom is that he ignored the danger he knew to exist and was the author of his own peril.

An approaching train has the right of way and a pedestrian who sees the train coming must yield. *Southern Ry. v. Whaley*, 170 Tenn. 668, 68 S.W. 2d 1061 (1936). At the least, such a pedestrian must pause and utilize his faculties of sight and hearing in an attempt to ascertain the location of the train before he ventures onto the crossing. *Maxwell v. Western Atlantic R.R. Co., supra*, 295 F. Supp. at 745; *Todd v. Cincinnati N.O. & T.P. Ry. Co., supra*, 185 S.W. 2d at 64. Flinchum is bound by what he should have

discovered in the exercise of ordinary care and it must be concluded that his negligence in failing to do so was the proximate cause of the injuries which are the subject of this action. *See Maxwell v. Western-Atlantic R.R. Co., supra*, 295 F. Supp. at 747.

Even if the jury believed that the train failed to give any warning of its approach and failed to keep a proper lookout the railroad could not be held liable. A warning would only have told Flinchum what he already knew. Moreover, it is clear that a moving train cannot stop in time to avoid hitting an obstruction cast so suddenly in its path. *See generally, Dean v. Southern Ry. Co.*, 327 F. 2d 757, 762 (6th Cir. 1964).

No. 71-1821

Exhibit 4

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

DANA FLINCHUM,
Plantiff-Appellee,

vs.

CLINCHFIELD RAILROAD COMPANY,
Defendant-Appellant.

On Appeal From the United States District Court, Eastern District of Tennessee, Northeastern Division.

Filed June 8, 1972

PETITION OF PLAINTIFF-APPELLEE TQ REHEAR

PETITION FOR REHEARING

To the Honorable, the Judges of the United States Court of Appeals for the Sixth Circuit:

Now comes Dana Flinchum, Plaintiff-Appellee, in the above entitled action, and respectfully prays that the above action be reheard and reconsidered for the following reason:

1. Because the evidence, viewed in the light most favorable to the plaintiff, supports the conclusion that he was guilty of **remote** contributory negligence, but it does not require the conclusion that he was guilty of **proximate** contributory negligence.

Assuming the validity of the jury's verdict on the question of the railroad's negligence, as the Court's opinion

says it does, and conceding plaintiff's contributory negligence, there remains the question as to whether plaintiff's negligence is proximate or remote. If the former, it bars his recovery; but if the latter, it only mitigates damages. As pointed out in ***Maxwell v. Western Atlantic Railroad Company***, 295 F. Supp. 740 at 745, cited in this Court's opinion, the issue of contributory negligence, including whether it is proximate and bars recovery or remote and mitigates damages, is generally for the jury to decide. It is respectfully insisted that it is an issue for jury, where it is apparent that reasonable minds not only can but have differed. The first jury verdict in this case was for $75,000.00; the second, for $50,000.00 (A 3, 5, 97). It is respectfully submitted that both verdicts reflect mitigation of damages for remote contributory negligence and the fact that they are not the same shows that reasonable minds have differed on the conclusion to be drawn from the circumstances of this case.

The issue of whether plaintiff's negligence was proximate or only remote is to be resolved in the light of what the plaintiff saw, knew and did at the time of the accident, not in the light of hindsight exercised in the calm detachment of the Courtroom. Viewing the evidence in the light most favorable to the plaintiff, it can be said that he was only remotely negligent. Plaintiff had never been across this crossing before this occurrance, Transcript page 26, Q, "You say you have never been across this crossing on Buffalo Street, or at Buffalo Street, prior to this accident?" A, "No sir, never have." Further, there is evidence in the record that he did not know the exact distance of the train, Transcript page 40, Q 12, "**And it was about twenty or twenty-five feet.**" A, "**It was dark. I couldn't tell. That would be my judgment.**" The jury could reasonably have concluded that when the plaintiff approached the crossing on a dark, wet evening, because of the obstruction of the sign, he was aware of only one set of tracks and the light of an engine at a

distance then undetermined but thought at the time to be great enough for him to cross safely. In the light of hindsight, at the trial under cross-examination, he thought this distance was about twenty-five feet, but he did not really know. The jury, looking at it from the viewpoint of what the plaintiff saw and knew at the time could have concluded that Mr. Flinchum could have reasonably expected to beat the train across the single track that he saw and that his unawareness that the train was on a second track amounted only to remote contributory negligence. Mr. Flinchum's negligence, whether proximate or remote, must be tested in terms of what he saw and knew, not in terms of photographs taken from the engine's approximate position. (Duplicates of Exhibit .) *Southern Railway Company v. Sloan*, 407 S.W. Ed. 205.

". . . questions as to whether railroad was guilty of negligence in the construction of the railroad crossing, whether its engineer was guilty of negligence in failing to keep a proper lookout for automobiles traveling on the public street over the improperly constructed crossing and in failing to take reasonable steps to avoid the collision and in failing to take reasonable steps to avoid the collision after he knew, **or should have known** that automobile was in a position of peril, and as to whether the several acts of negligence, or any one of them, was the proximate cause of the accident and resulting deaths and damage **were for jury."**

"Review by an appellate court must be governed by the rule safeguarding the constitutional right of trial by jury which required appellate court to take the strongest legitimate view of all the evidence to uphold the verdict, to assume the truth of all that tends of support it, to discard all to the contrary, and to allow all reasonable inferences to sustain the verdict. and if there is a material evidence to support the verdict it must be affirmed."

This case law supercedes the cases cited in defendant's brief as well as the cases cited by this Honorable Court. The negligence of railroad in the construction of the crossing in the said cited case is analogous to the defendant in the instant case failing to remove the four perpendicular signs from their Buffalo Street crossing, Ex. 39 and 105, which blocked plaintiff's view of the train.

Opposing Attorney has mislead the Court in his statement that contributory negligence is a bar to plaintiff's recovery since enactment of Tennessee Statutory Precautions Act. T.C.A. 65, 1208-1209:

> "The burden of proof, the issue of proximate cause, and the issue of contributory negligence shall be tried and be applied in the same manner and with the same effect as in the trial of **other negligence actions under the common law in Tennessee.**"

> **"Under Tennessee law, a plaintiff may be guilty of remote contributory negligence and not barred from recovery, but damages are reduced accordingly."** *Helen S. Sharp & Rex P. Sharpe vs. J.C. Penney Company, Inc.*, U.S. Court of Apeals, Sixth Circuit, June 10, 1966, 361 Fed. 2d 722.

This is the present common law in Tennessee and the doctrine of remote contributory negligence of is in accord with the said T.C.A. 65-1209 which permits a mitigated judgment as in the case before this Court. The Court will note the date of this case is after the 1959 statutory Railroad Precautions Act.

It is respectfully submitted that this Court has failed to make the distinction between proximate contributory negligence and remote contributory negligence required by the Tennessee law; that the whole issue of contributory negligence was properly submitted to the jury by the District Judge; that the jury properly mitigated damages for remote

contributory negligence; and that the judgment of the District Court should be affirmed.

Respectfully submitted,

E. Eugene Christian
Attorney for Plaintiff-Appellee,
Dana Flinchum

E. Eugene Christian, Attorney
Hamilton National Bank Bldg.
Johnson City, Tennessee 37601

CERTIFICATE

I, E. Eugene Christian, Attorney for Plaintiff-Appellee, Dana Flinchum, hereby certify that the foregoing petition is in my opinion well founded in law and should be granted and is not interposed for the purpose of delay.

E. Eugene Christian

CERTIFICATE OF SERVICE

STATE OF TENNESSEE
COUNTY OF WASHINGTON

I, E. Eugene Christian, Attorney for Plaintiff-Appellee, Dana Flinchum, hereby certify that I have served the foregoing Petition for Rehearing upon the Defendant-Appellant, Clinchfield Railroad Company, be depositing a true copy of same in the United States Mail, First Class, postage prepaid, addressed to Ferdinand Powell, Attorney at Law, 2101 North Roan Street, Johnson City, Tennessee, 37601, as Attorney for Defendant-Appellant.

This the 8th day of June, 1972.

E. Eugene Christian
Attorney for Plaintiff-Appellee
Dana Flinchum

No. 71-1821

Exhibit 5

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

DANA FLINCHUM
Plaintiff-Appellee

v.

CLINCHFIELD RAILROAD COMPANY
Defendant-Appellant

ORDER
Filed June 20, 1972

Before: CELEBREZZE and PECK, *Circuit Judges*, and O'SULLIVAN, *Senior Circuit Judge*.

Appellee having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT

James A. Higgins
Clerk

No. 71-1821

Exhibit 6

In The United States Court Of Appeals

FOR THE SIXTH CIRCUIT

DANA FLINCHUM,
Plaintiff-Appellee,
v.
CLINCHFIELD RAILROAD COMPANY,
Defendant-Appellant.

STAY OF MANDATE PENDING APPLICATION FOR *CERTIORARI*
Filed June 29, 1972

Judgment having been entered in the above entitled action on the 26th day of May, 1972, against the Plaintiff-Appellee, and the Plaintiff-Appellee having filed Petition to Rehear and said Petition to Rehear denied and said denial received by Plaintiff-Appellee's Attorney on June 22, 1972, the Plaintiff-Appellee's Attorney herewith moves the Court to stay of mandate in the above captioned case pending perfection of Petition for Writ of *Certiorari* to the Supreme Court of the United States.

STATE OF TENNESSEE)
) ss.:
COUNTY OF WASHINGTON)

I, E. Eugene Christian, Attorney for Plaintiff-Appellee, Dana Flinchum, hereby certify that I have served the foregoing Stay of Mandate Pending Application for *Certiorari* upon the Defendant-Appellant, Clinchfield Railroad Company, by depositing a true copy of the same in the

United States Mail, first-class postage prepaid addressed to Ferdinand Powell, Jr., Attorney at Law, 2101 North Roan Street, Johnson City, Tennessee 37601, as Attorney for Defendant-Appellant, this the 27th day of June, 1972.

E. Eugene Christian
Attorney for Plaintiff-Appellee

Address: 203 Hamilton National Bank Bldg.
Johnson City, Tennessee